IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Chapter VIII, Rule 32(2) (b)

Description of case

Date of decision: 10.07.2006

Criminal Appeal No. 1387 of 2001
(Old No. 2174 of 1985)

Balkar Singh
S/o Goma Singh
R/o Paigakhas
P.S. Kashipur, District Nainital …….Appellant

Vs.

State ……..Respondent.

Mr. S.K. Aggarwal and Mr. M.S. Pal, Senior advocates with Mr. Gopal K. Verma and Mr. V.S. Pal, Advocates for the appellant.
Mr. H.C. Pande, Additional Government Advocate for the State.

A.F.R. (Approved for Reporting)
Not approved for Reporting

(Initials of Judge)

Date: 10.07.2006

Note: Bench Reader will attach this at the top of first page of the judgment when it is put up before the Judge for signature.

Judgment Reserved

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Coram: Hon'ble Rajeev Gupta, C.J.
Hon'ble Prafulla C. Pant, J.

Per: Hon'ble Prafulla C. Pant, J.

This appeal, preferred under Section 374 (2) of Code of Criminal Procedure, 1973 (herein-after for brevity referred as Cr.P.C.), is directed against the judgment and order dated 14.08.1985, passed in Sessions Trial No. 119 of 1983, whereby the then learned Ist Additional Sessions Judge, Nainital, convicted appellant Balkar Singh under Section 302 of Indian Penal Code, 1860 (herein after referred as I.P.C.), for commission of murder of Ajeet Singh, resident of village Rampur-Balbhadra and Bhajan Singh, R/o village Basai, and sentenced him to

imprisonment for life. He is further convicted under Section 301 of I.P.C., for attempting to commit murder of Roop Singh, R/o Rampur-Balbhadra, and sentenced to imprisonment for ten years on that count.

2. We heard learned counsel for the appellant and learned Additional Government Advocate/Public Prosecutor and perused the entire record.

3. Prosecution story, in brief, is that on 01.01.1983, at about 5:00 P.M., Ajeet Singh (one of the deceased), along with P.W. 2 Roop Singh (injured) and P.W. 1 Harbhajan Singh (informant), all R/o village Rampur-Balbhadra, and Bhajan Singh (another deceased), R/o village Basai, were going in a tractor to take flour from wheat flour mill (CHAKKI) of one Ram Prasad in village Paigakhas, situated within the limits of P.S. Kashipur (earlier part of District Nainital). At about 5:15 P.M., when they reached and got down in village Paigakhas, accused/appellant Balkar Singh met them and asked Ajeet Singh to have some wine with him, as it was a chilly day. On this, Ajeet Singh curtly replied that he would not have wine, bought with the money of the accused/appellant. There was old enmity between Balkar Singh (accused/appellant) and Ajeet Singh, as earlier on a report lodged against accused/appellant Balkar Singh by the family members of Ajeet Singh, he had been convicted but later on, acquitted by the appellant court. When Balkar Singh reiterated his

request to have drinks with him and not to develop further the enmity between them, Ajeet Singh again firmly told that he would not have liquor with Balkar Singh and he may do whatever he likes. This made Balkar Singh feel insulted and he threatened Ajeet Singh (one of the deceased) that he will have to face the consequence of this refusal. He (Balkar Singh) went to his house to bring his gun and in the meantime Ajeet Singh after taking flour from the wheat flour mill, proceeded for his further journey. When Ajeet Singh and others, in their tractor, reached near temple of goddess in village paigakhas, accused Balkar Singh armed with a gun, fired a shot at Ajeet Singh. It was still around 5:30 P.M. Ajeet Singh (deceased) on seeing Balkar Singh, firing at him, drove tractor a bit faster. Balkar Singh, kept on firing shots, one after another and injured Ajeet Singh, Bhajan Singh and Roop Singh. Bhajan Singh (another deceased) along with Roop Singh (P.W. 2) and Harbhajan Singh (P.W. 1), in an attempt to save their lives, jumped from the tractor and took shelter behind rubbish heap (GHURAS) by the side of pathway in the village. Ajeet Singh died on the spot in the tractor (he was the person driving the tractor). Meanwhile, villagers started assembling towards the scene of occurrence and accused/appellant Balkar Singh, by then left the place. Injured Roop Singh and Bhajan Singh, were taken to civil hospital in the same evening but Bhajan Singh succumbed to the injuries in the hospital. P.W. 1 Harbhajan Singh lodged

oral First Information Report with police station Kashipur, at 7:20 P.M. on the very day i.e. 01.01.1983, which was registered as crime No. 2 of 1983 under Section 302/307 I.P.C. against accused Balkar Singh. On the basis of the oral report, check report (Ext. A-1) was prepared and necessary entry in the general diary was made, extract of which is Ext. A-23. P.W. 8 Devendra Kumar Thapliyal, Inspector Incharge of the police station- Kashipur, took up the investigation of the case. Meanwhile, the injuries of Roop Singh (P.W. 2), were recorded in the civil hospital at 7:45 P.M. on the same day i.e. 01.01.1983. Inquest report (Ext. A-3) was prepared after dead body of Ajeet Singh was taken into possession by the police on 02.01.1983, at 7:30 A.M. and police form No. 33 (Ext. A-4), sketch of his dead body (Ext. A-5), police form No. 13 (Ext. A-6) and letter (Ext. A-7) to Chief Medical Officer for post mortem examination, were prepared. After the death of Bhajan Singh, his dead body was also taken into possession by police on 02.01.1983, at about 12:30 P.M. and an inquest report (Ext. A-15), police form No. 33 (Ext. A-16), sketch of his dead body (Ext. A-17), police form No. 13 (Ext. A-20) and letter (Ext. A-8) to Chief Medical Officer, requesting for post mortem examination, were prepared. The Investigating Officer prepared the site plan (Ext. A-21) and recorded the statements of the witnesses. He also prepared the recovery memo (Ext. A-9) of the turban, lying at the place of occurrence. After completion of investigation,

the Investigating Officer submitted charge sheet (Ext. A-24).

4. The Chief Judicial Magistrate, on receipt of the charge sheet, after providing the necessary copies to the accused person, as required under Section 207 of Cr.P.C., committed the case to the Court of Sessions, for trial. Learned Sessions Judge, after hearing the prosecution and defence, framed charge of the offence punishable under Section 302 I.P.C. on 19.08.1983 against accused Balkar Singh and separately framed charge against him that of offence punishable under Section 307 I.P.C. Accused appellant Balkar Singh, pleaded not guilty and claimed to be tried of the charges framed against him. Prosecution got examined P.W. 1 Harbhajan Singh, informant and eye-witness, P.W. 2 Roop Singh, injured and eye-witness, P.W. 3 Jeet Singh, another eye-witness, P.W. 5 Dr. S.P. Gupta, who examined the injuries of Roop Singh (injured), P.W. 6 Anand Swaroop Sharma, Sub- Inspector who prepared inquest report (Ext. A-3) of the dead body of Ajeet Singh, police form No. 33, sketch of the dead body of Ajeet Singh, letter to the Chief Medical Officer for post mortem examination (Ext. A-7 and Ext. A-8), prepared memo (Ext. A-9) of recovered turban (Ext. 1) of injured Roop Singh, recovered blanket and turban (Ext 2 and Ext. 3) of deceased Ajeet Singh and its memo (Ext. A-10), recovered money received from the person of said deceased (Ext. 4 to Ext. 7), took possession of waddles

(Ext. 8 to Ext. 11) and prepared its memo (Ext. A-11), took simple and blood stained soil (Ext. 12 and Ext. 13) from the place where Bhajan Singh was lying, prepared its memo (Ext. A-12), took simple and blood stained soil (Ext. 14 and Ext. 15) from the place where the tractor was standing and prepared memo (Ext. A-13), took handle of the tractor and sack of wheat flour and prepared memo (Ext. A-14), took dead body of Bhajan Singh into his possession in the hospital, and prepared inquest report (Ext. A-15) of his dead body, police form No. 13, sketch of the dead body of Bhajan Singh (Ext. A-17), letter to the Chief Medical Officer, for post mortem examination (Ext. A-16 and Ext. A-18), P.W. 8 Devendra Kumar Thapliyal, Inspector Incharge of the police station- Kashipur, who prepared Site Plan (Ext. A-21) and submitted charge sheet (Ext. A-24) and P.W. 9 Dr. R.P. Rastogi, who conducted autopsy on the dead bodies of deceased Bhajan Singh and deceased Ajeet Singh and prepared post mortem examination reports (Ext. A-25 and Ext. A-26). Apart from this, affidavit of P.W. 4, Constable Sunder Lal, who took the dead boy of Ajeet Singh in a sealed condition for post mortem examination, and affidavit of P.W. 7 Constable Trilok Chand Joshi, who took the dead body of deceased Bhajan Singh for post mortem examination, were filed in support of prosecution. The oral as well as documentary evidence was put to the accused person under Section 313 of Cr.P.C. by the trial court in reply to which he alleged the evidence to be false and

claimed that he has been falsely implicated due to enmity. In defence, though no witness was got examined, but documentary evidence dying declaration/statement of Roop Singh and endorsement thereon (Ext. B-1 and B-2), report of Medical Officer thereon (Ext. B-3) and copy of judgment dated 07.02.1980 of earlier litigation (Ext. B-4), were relied upon. After hearing the prosecution and the defence, accused Balkar Singh is found guilty of the charges framed against him by the trial court and after hearing both the sides on sentence, sentenced the accused under Section 302 I.P.C. to imprisonment for life and under Section 307 I.P.C. to rigorous imprisonment for ten years. Aggrieved by judgment and order of the trial court, convict preferred appeal before Allahabad High Court. The appeal is received by transfer to this Court under Section 35 of U.P. Reorganisation Act, 2000, for its disposal.

5. Before further discussions, it is pertinent to mention here the ante mortem injuries found on the person of Ajeet Singh and Bhajan Singh (both deceased) and injuries received on the person of Roop Singh. P.W. 9 R.P. Rastogi, Medical Officer who conducted autopsy on the dead body of deceased Ajeet Singh on 02.01.1983 at 4:00 P.M. and prepared the post mortem examination report (Ext. A-27), recorded following ante mortem injury on the person of the deceased:-

1. **Lacerated wound with inverted margins 3cm X 2cm X cavity deep on left side back 11 cm above Iliac Crest 3cm away from the mid.**

According to the Medical Officer, the cause of death was shock and haemorrhage from the aforesaid injury.

6. The same witness i.e. P.W. 9 Dr. R.P. Rastogi on the same day i.e. on 2.01.1983, conducted autopsy at 3:30 P.M. on the dead body of deceased Bhajan Singh and prepared post mortem examination report (Ext. A-26) and found following ante mortem injuries on the person of the deceased:-

1. Gun shot wound of entrance 3cm between lower angle of scapula on back of the right chest with inverted margins 5cm X 3cm X chest cavity deep. Injuring right lung. Ribs fractured 3rd and 4th on the front. Three waddles and 28 pieces pellets collected from the wound. No blackening and tattooing present.

According to the Medical Officer, death of the deceased was caused due to the shock and haemorrhage due to the aforesaid injury.

7. P.W. 5 Dr. S.P. Gupta, medically examined Roop Singh (P.W. 2) on 01.01.1983 at about 7:45 P.M. and

prepared injury report (Ext. A-2). He found following injuries on the person of Roop Singh :-

1. **Lacerated wound 7cm X 5cm X cavity deep on the left side of chest infra axillary area upper end of wound, 14cm lateral to left nipple underlying ribs fractured, bleeding present, air coming out of the wound with each respiratory movement, pellets lying in the wound. No blackening or tatooing of wound margin present.**
2. **Three small firearm wounds of entry at upper end of wound and at lower end of the wound, measuring .2cm X .2cm depth not probed. Margins inverted. No blackening or tatooing present. Bleeding present. Kept under observation. Advised X-ray of chest.**

8. P.W.2 Roop Singh is the star witness of this case. He is eye-witness who received injuries in the incident. P.W. 2 Roop Singh, has stated that it was about 5:00 P.M. on 01.01.1983, when he along with Ajeet Singh and Bhajan Singh (both deceased) and Harbhajan Singh (P.W. 1), was going in a tractor to wheat flour mill of

Ram Prasad in village Paiga. When they reached in the village, they met accused/appellant Balkar Singh, who asked Ajeet Singh to have drinks with him. On this, Ajeet Singh refused offer of the accused by saying that he would not accept drinks from the person like him. Balkar Singh (accused/appellant) asked thereafter to Ajeet Singh not to develop further the enmity. However, Ajeet Singh did not accept the offer and told Balkar Singh that he may do whatever he likes. P.W. 2 Roop Singh further states that then, accused Balkar Singh went to his house. Meanwhile, after picking up flour from the wheat flour mill, the witness along with deceased Ajeet Singh, Bhajan Singh (both deceased) and Harbhajan Singh (informant), proceeded from village Paiga. Hardly, they reached near 'DEVI' (goddess) temple, Balkar Singh came armed with gun. It was 5:30 P.M. He started firing shots. On this, Ajeet Singh increased the speed of tractor but Balkar Singh kept on firing at the tractor, chasing the same. The first fire did not hit any one. Second fire, hit Ajeet Singh from the side of his back. Bhajan Singh also got fire arm injury and fell down from the tractor. P.W. 2 Roop Singh further states that he also got gun shot injury and jumped from the tractor. In the process of jumping, his turban also fell down.

9. P.W. 1 Harbhajan Singh, the informant and eye-witness of the incident, corroborates the statement of P.W. 2 Roop Singh and states that on the date of the

incident, he along with deceased persons and Roop Singh, were going on a tractor to take the flour from the wheat flour mill. When they reached in the village Paiga, at the wheat flour mill, they met accused Balkar Singh who asked Ajeet Singh to have drinks with him. The offer was turned down by Ajeet Singh. This witness further corroborates the fact that when Ajeet Singh along with the above named persons were returning after taking the flour, accused Balkar Singh, armed with a gun, fired at tractor near 'DEVI' (goddess) temple. This witness further corroborates that he jumped from the tractor along with other two. While Ajeet Singh continued to drive the tractor. P.W. 1 Harbhajan Singh further states that he took shelter with other two injured in the rubbish heap, by the side of the pathway. When the sound of gun silenced, he came out and found that Ajeet Singh had already died in the tractor. This witness further states that he found Roop Singh and another deceased in an injured condition. When his family members came, the injured Roop Singh and Bhajan Singh, were taken in a tractor to the hospital. P.W. 1 Harbhajan Singh further states that on way to hospital, he got down at Police Station, Kashipur and lodged First Information Report (Ext. A-1).

10. P.W. 3 Jeet Singh, the other eye-witness of the incident, also corroborates the prosecution story and told that on 01.01.1983, there was a ceremony in the

Roop Singh's village, where he had gone. After the ceremony, he was returning to his village. Roop Singh (P.W. 2), Bhajan Singh and Ajeet Singh (both take flour from wheat flour mill. This witness further states that when he and the aforesaid persons got down at the mill, accused Balkar Singh offered drinks, which was turned down by Ajeet Singh. This witness further corroborates that on this, Balkar Singh asked Ajeet Singh not to develop further the enmity. However, the deceased challenged Balkar Singh to do whatever he liked. P.W. 3 Jeet Singh further states that when aforesaid persons were returning in their tractor, Balkar Singh came with a gun, chased them and fired at them. The witness further corroborates that Ajeet Singh died in the tractor itself and Roop Singh and Bhajan Singh, were taken to the hospital, where Bhajan Singh succumbed to the injuries. The witness further corroborates the statement of P.W. 1 Harbhajan Singh, stating that he lodged First Information Report when other two injured were on their way to the hospital.

11. The ante mortem injuries found on the deceased persons, as apparent from Ext. A-26 and Ext. A-27 and injuries received by P.W. 2 Roop Singh, as is clear from the injury report (Ext. A-2), corroborate the evidence of above discussed eye-witnesses that appellant Balkar Singh committed murder of both the deceased and attempted to commit murder of Roop

Singh (P.W. 2). The date and time of death of deceased Ajeet Singh and that of Bhajan Singh alleged by prosecution gets corroboration from the aforesaid post mortem examination reports. The injuries found on the person of P.W. 2 Roop Singh by Medical Officer (P.W. 5), also corroborate the fact that he received injuries on date and time, narrated by him in his statement. The First Information Report, lodged with the police station – Kashipur is a prompt one as the report was lodged with the police within two hours of the incident and the place of occurrence was at a distance of 8 Kms. away from the police station. Accused/appellant Balkar Singh is named accused in the First Information Report. Though the defence has shown, on the basis of the copy of judgment-dated 07.02.1980 (Ext. B-4), that there was enmity from the time before the date of incident, between the parties, but in our opinion that by itself is not sufficient for complainant to implicate the accused/appellant Balkar Singh falsely, saving the actual culprits. The pellets and waddle pieces found from the dead body of deceased Bhajan Singh further corroborates the use of fire arm as narrated in the prosecution story.

12. On behalf of the accused/appellant, it is argued that in a running tractor, the injuries could not have been caused in the manner narrated by the prosecution witnesses, particularly when after the first fire, the speed of the tractor was increased by Ajeet Singh.

From the site plan (Ext. A-21), we found that the tractor was not running on a high way it was in a village pathway and in the field. The speed of the tractor which has come on the record from the statement of the witnesses, was 5 Km per hour and enhanced speed was 10 Km. Per hour. Such speed of tractor can always be chased to some distance, by any person, following it on foot. The argument advanced on behalf of the accused/appellant, does not carry force to create reasonable doubt in the prosecution story.

13. Shri S.K. Agrawal, Senior Advocate, on behalf of the accused/appellant contended that there is contradiction on the point of distance from where shots were fired at the deceased persons in the statements of eye-witnesses. Had there been a situation where the deceased persons were sitting or standing at a particular place, such contradiction could have created some doubt in the manner of causing injuries but in a moving condition of a tractor and that of the accused, the distance between the gun and the deceased or the injured cannot remain the same when one after another shots were fired while chasing the tractor by the accused. As such, we are unable to accept the contention of the learned counsel for the accused/appellant.

14. Shri Agrawal, learned senior Advocate, drew our attention to the dying declaration (Ext. B-1) of P.W. 2

Roop Singh (who survived the injuries) and submitted that the statement of P.W. 2 Roop Singh is contradictory to what has been stated by him in the dying declaration. The dying declaration of Roop Singh after he survived, cannot be said to be a dying declaration and it can only be used at the most as a statement recorded under Section 164 of Cr.P.C. that too for confronting the witness. We have gone through the statement dated 01.01.1983, recorded at 9:30 P.M. in the hospital of Roop Singh and found in substance the prosecution story remains the same, as against the accused Balkar Singh that he offered drinks to Ajeet Singh near the wheat flour mill and when it was turned down, Balkar Singh hurled abuses and went to his house and came back, armed with a gun. In said statement (Ext. B-1), it is also stated that near 'DEVI' (goddess) temple, accused Balkar Singh fired from his gun, thrice. Considering the condition of injured Roop Singh in the hospital, it appears that he narrated the incident in substance while in the court, he has narrated the prosecution story in detail.

15. It is also argued before us on behalf of the accused/appellant that there is no blackening and tatooing found in the ante mortem injuries of the deceased or injuries found on the person of Roop Singh (P.W. 2) while the distance from where the shots are fired is close one. In this regard, it is sufficient to mention here that the Medical Officer (P.W. 9) himself

in his examination, has answered, if the person receiving injury has put on clothes, the blackening and tatooing would not be found in the injury even if received from a close range. It has come on the record in the evidence that the deceased and injured had not only put on the clothes but they had wrapped blankets as it was a chilly day of 1st of January. As such, absence of blackening and tatooing in the injuries on the person of the injured or the deceased, do not create doubt in the prosecution story.

16. Lastly, it is submitted on behalf of the accused/appellant that the place of occurrence appears to be different in the site plan as against what has been narrated by the eye-witnesses. We have gone through the evidence of eye-witnesses and the site plan and we do not see any change in the place of occurrence, rather it (Site plan- Ext. A-21) corroborates the statement of eye-witnesses.

17. For the reasons, as discussed above, we do not see any error of fact or that of law committed by the trial court in convicting the accused/appellant Balkar Singh on the charge of the offence punishable under Section 302 I.P.C. for committing murder of Ajeet Singh and Bhajan Singh, and of the offence punishable under Section 307 I.P.C. for attempting to commit murder of Roop Singh. Sentence awarded against the appellant under aforesaid charges is also just and proper in the

facts and circumstances of the case. Therefore, the impugned judgment and order passed by the learned trial court does not warrant any interference. Accordingly, the judgment and order dated 14.08.1985, passed in Sessions Trial No. 119 of 1983 by Ist Additional Sessions Judge, Nainital, is up-held. The appeal is dismissed. The conviction and sentence of appellant Balkar Singh is maintained. Appellant is on bail. His bail is cancelled. The court concerned shall take the appellant into custody to make him serve out the sentence.

(Prafulla C. Pant, J.) **(Rajeev Gupta, C.J.)**

Dt: 10.07.2006

Sweta